United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1417
76-1441

To be argued by
PETER R. CASEY, III

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-1417, 76-1441

UNITED STATES OF AMERICA,
Appellee,

—v.—

DANIEL VALERIANO and FRANK KINSLER,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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TITLE 18, UNITED STATES CODE

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive

days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the fact and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the

authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct

that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for con-

tinued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order

of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge or competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the

above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communications, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order

granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1417, 76-1441

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL VALERIANO and FRANK KINSLER,

Appellants.

BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury sitting at Hartford, Connecticut returned a True Bill on May 3, 1974, charging the appellants, Daniel Valeriano and Frank Kinsler, and five other individuals, with violating Sections 1955 and 371 of Title 18, United States Code. Daniel Valeriano pled not guilty to the charges on June 10, 1974, and Frank Kinsler followed suit on June 11, 1974. All documents relevant to electronic surveillance were Ordered unsealed on June 21, 1974. The government filed Notice of Readiness on July 1, 1974. The following motions were subsequently made on behalf of the appellants:

August 16, 1974—Kinsler: Motion to Dismiss and Motion to Suppress

September 5, 1974—Valeriano: Motion to Dismiss,

Motion to Suppress, and Motion for Bill of Particulars

Briefs were filed by Kinsler on September 30, 1974 and October 4, 1974, and by Valeriano on October 11. 1974. The government's response was filed on November 5, 1974. A hearing was held before Judge Zampano on the Motions to Suppress on November 18, 1974, with the Court reserving decision. On February 18, 1976, a Memorandum of Decision was filed and entered in which Judge Zampano denied all Motions to Dismiss and Suppress.

On July 12, 1976, Frank Kinsler requested leave to change his plea, which was granted by Judge Zampano. The appellant Kinsler then pled guilty to Count One of the Indictment (18 U.S.C. § 1955).

On July 20, 1976, a jury of twelve and two alternates was empanelled in the trial of the appellant Valeriano. The government began its presentation of evidence on July 21, 1976. The government rested on July 30, 1976, after seven trial days, having called eight witnesses. The appellant Valeriano called one witness on July 30th and then rested. The Court charged the jury on August 3, 1976, and the jury retired for deliberation at 12:35 p.m. At 4:38 p.m., on the same date, the jury returned a verdict of guilty on both counts against Daniel Valeriano.

On September 13, 1976, Judge Zampano sentenced Frank Kinsler to a one year suspended sentence and four years probation, and sentenced Daniel Valeriano to two years imprisonment on Count One, a two year suspended sentence on Count Two, and four years probation. These appeals followed.

Statement of the Facts

Application was made by the United States, on January 15, 1973, to the Honorable Thomas F. Murphy, United States District Judge, District of Connecticut, for an Order authorizing the interception of wire communications from the telephone (624-8802) subscribed to by Daniel Valeriano, and a different phone subscribed to by another individual (Appendix I). The application relied for probable cause upon the affidavit of Special Agent Raymond Connolly (Appendix II). Judge Murphy issued an Order authorizing the wiretapping of the two telephones for a period of fifteen (15) days, for the purpose of determining the manner in which Daniel Valeriano, Charles Furman, Frank Gunn, Catherine Brown, an individual known only as "Alfie", and unknown others, conducted an alleged "policy" operation. (Appendix III).

The wiretaps were established on January 16, 1973 and terminated on January 27, 1973 (Tr., p. 216). A pen register device was also employed during that period. The original tape recordings were sealed by the Honorable T. Emmet Clarie, United States District Judge, District of Connecticut, on January 29, 1973 (Appendix IV and V).

The 90 day time limit on the service of inventory would have expired on April 30, 1973. On April 25, 1973, however, the government received a 30 day postponement from the Honorable Jon O. Newman, United States District Judge, District of Connecticut (Judge Murphy was in Mexico at the time) (Appendix VII). On May 22, 1973, Judge Murphy authorized an additional 45 day postponement (Appendix VIII). Inventory was served on five individuals, including Daniel Valeriano, on July 10, 1973 (Appendix IX). Appellant Kinsler was not served.

On March 8, 1974, Daniel Valeriano gave a voice exemplar to Federal Agents (Tr., p. 208), and on April 3, 1974 Frank Kinsler gave a voice exemplar (Tr., p. 203). Valeriano, Kinsler, and five other individuals were indicted on May 3, 1974.

At the trial of Daniel Valeriano, a government expert identified Valeriano as a partner in an illegal numbers business (Tr., p. 697), who kept the books for the operation (Tr., p. 692). Kinsler was identified as a "street writer" for the operation (Tr., p. 679). There were twenty-three numbers writers in the operation (Tr., p. 743). The business had been in operation for at least twenty-seven continuous weeks (Tr., p. 707), and had had a gross revenue of over $2,000 on more than one day (Tr., p. 753).

ARGUMENT

I.

The Affidavit Of Special Agent Raymond Connolly, In Support Of The Application For An Order Authorizing Wire Interceptions, Contained Sufficient Factual Information To Permit The Authorizing Judge To Reasonably Conclude That Other Investigative Techniques Had Been Unsuccessful, Or Would Be Unlikely To Succeed.

The appellant Kinsler alleges that Agent Connolly's affidavit fails to sufficiently establish that other investigative techniques were not likely to succeed. A review of the affidavit, however, discloses the following information:

1. Agent Connolly had participated in over 80 gambling investigations; (Appendix II, p. 1);
2. Physical surveillance had failed to establish sufficient evidence of a violation (Appendix II, p. 2);

3. That an analysis of toll call records had been made (which showed only that some of the suspects were calling one another) (Appendix II, p. 9);
4. That the suspects used flash paper for the express purpose of frustrating searches by law enforcement officers (Appendix II, p. 6, 10);
5. That his experience had shown that interviews and grand jury investigation would be unsuccessful and would merely serve to alert the suspects to the existence of the investigation (Appendix II, p. 11);
6. That his experience had shown that raids and searches were not likely to be successful in gathering sufficient evidence to prove the elements of the offense, and that records were frequently destroyed or in code (Appendix II, p. 11-12);
7. That the informants had refused to testify (Appendix II, p. 12).

The appellant first alleges that *no* other techniques had been tried by the government. This is clearly at odds with the facts, however, because Agent Connolly's affidavit, as pointed out above, sets forth three techniques—surveillances, toll call analysis, and testimony by informants—which had, in fact, been attempted, but which hardly presented sufficient evidence to form the basis of an illegal gambling business prosecution (18 U.S.C. § 1955).[1] The appellant then compounds his error by asserting that the investigation had been such a "success" that the government could not rely on the statutory alter-

[1] The statute requires proof that five or more individuals participated in a gambling business, in violation of state law, which had been in substantially continuous operation for a period in excess of 30 days, or had a gross revenue of $2,000 in any single day.

native of attempting to show why other techniques would reasonably be unlikely to succeed. He alleges that the government had failed to make a proper showing in this regard. Of course, the bulk of the information contained in the affidavit came from sources who had refused to testify. Moreover, the government's application requested the eavesdropping authority in order to determine the manner in which certain named individuals and *unknown* others

> ". . . participate in the conducting of an illegal gambling business . . . and which reveal the identity of their confederates, their places and manner of operation, and the nature of the conspiracy involved therein . . ." (Appendix I, p. 6).

The appellants rely heavily on *United States* v. *Kalustian*, 529 F.2d 585 (9th Cir. 1976), in which the Ninth Circuit rejected an affidavit as being too "conclusory". It should be noted that *Kalustian* does not reflect the law of this or any other *Circuit*. *See*, *United States* v. *Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3659 (1976); *United States* v. *James*, 494 F.2d 1007, 1015-16 (D.C.Cir), *cert. denied*, 419 U.S. 1020 (1974); *United States* v. *Armocida*, 515 F.2d 29, 38 (3d Cir. 1975), *cert. denied*, 423 U.S. 858; *United States* v. *Schaefer*, 510 F.2d 1307, 1310 (8th Cir.), *cert. denied*, 421 U.S. 978 (1975); *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *United States* v. *Bobo*, 477 F.2d 974 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975); *United States* v. *O'Neill*, 497 F.2d 1020, 1025 (6th Cir. 1974); *United States* v. *Fina*, 405 F. Supp. 267, 272-73 (E.D.Pa. 1975) (explicitly rejecting *Kalustian*). We likewise do not agree with the conclusions reached by the Ninth Circuit.

Although *Kalustian* recognized that Congress did not require the exhaustion of "all possible" investigative

techniques, *United States* v. *Kalustian*, *supra*, at 589, the Court glossed over the fact that paragraphs (1)(c) and (3)(c) of Section 2518 are written in the disjunctive, and that other methods must only "*reasonably* appear to be *unlikely* to succeed" (emphasis added). The agent in *Kalustian* drew largely on his and other agents' experience, but the Court apparently felt that this was too 'conclusory". Yet his conclusions were, we believe, an accurate representation of the actual methods used by gamblers to frustrate law enforcement efforts. How does one go about proving a negative without actually trying the questioned methods, which would, in turn, surely give away the game? *Kalustian* also gave emphasis to the fact that State authorities were successful in prosecuting gambling cases without resorting to electronic surveillance. The opinion totally ignores, however, the fact that the federal anti-gambling statute, Title 18, United States Code, Section 1955, unlike State statutes, requires more than just catching a gambler in the act of accepting wagers. The federal statute requires *proof* that the operation involves five or more individuals, in designated capacities, which has been in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. Certainly without these restrictions, the federal government could also use more conventional tactics to make gambling cases. That is not reality, however, for the government must work within the parameters of the statute. These types of gambling operations are, in fact, "tough to crack", which Congress obviously foresaw by including Section 1955 as one of the statutes for which electronic surveillance could be utilized. *See*, Title 18, United States Code, Section 2516.

This Court has adopted a more realistic view of the problem. In *United States* v. *Steinberg*, *supra*, the Court

had before it an affidavit containing fewer "facts" than in this case or *Kalustian*. The Court stated the following:

> "Although the affidavit provides little factual basis for concluding that normal investigative techniques had not suffice[d] to expose the crime, . . . paragraphs (1)(c) and (3)(c) of § 2518 are in the disjunctive; and the Government's main reliance is upon the second alternative provided by the statute. We must view the affidavit as a whole and 'in a practical and commonsense fashion', . . . while the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supply.
>
> When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards . . . We are satisfied that the Government has *substantially* complied with the statutory mandate, and note that on oral argument appellants could advance no logical alternative to wiretapping . . . Indeed, *wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation.*" *Supra*, at 1130 (citations omitted; emphasis added). *See also*, *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States* v. *Hinton*, Slip Op., 2d Cir. September 27, 1976, Docket Nos. 75-1402, 75-1418, 75-1441, 75-1445, 76-1024, at 5695-5696.

The legislative history of Title 18, United States Code, Section 2518(1)(c) and (3)(c) also bolsters the government's position:

> "Subparagraph (c) requires a full and complete statement as to whether or not normal investigation procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous . . . The judgment would involve a consideration of all the facts and circumstances . . . Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely . . . *What the provision envisions is that the showing be tested in a practical and commonsense fashion.*" S. Rep. No. 1097, 90th Cong., 2d Sess., 1968, U.S. Code and Admin. News, pp. 2112, 2190 (citations omitted; emphasis added).

Here Agent Connolly not only reported that several techniques had been utilized with only limited success. He explained, based on his experience in some eighty previous investigations, *why* interviews and summoning witnesses before a grand jury were unlikely to be productive (Appendix II, p. 11). He explained the problems inherent in searches, including the fact that the suspects were reported to use flash paper (Appendix II, p. 6, 10, 11-12). These are not bare "boilerplate" excuses, but are facts based on reason and experience. The only obvious investigative technique not covered by the affidavit is the potential use of undercover agents to infiltrate the organization. In *United States* v. *Vento*, 533 F.2d 838 (3d Cir. 1976), the Third Circuit was faced with an affidavit which likewise made no mention of the techniques, but the Court discounted its absence and stated:

> "That the government's application did not mention the use of undercover agents, as defend-

ants stress, is not controlling. In this situation an undercover agent would be incapable of providing the Strike Force with information about the full extent of the criminal operations unless placed in constant touch with Gregorio and his closest confederates: Undercover agents are not readily insinuated into a conspiracy, and may be exposed to unusual danger. The circumstances here do not require that the government justify its failure to plant a spy in the midst of Gregorio's enterprise. The application of the wiretap in this case comports with the directions of Title III." *Supra*, at 850.

Both Judge Murphy, in granting the wiretap authorization, and Judge Zampano, in reviewing that action (Appendix X, p. 7-9), found that the government had sustained its statutory burden regarding alternative investigative means, and we respectfully urge this Court to do likewise.

II.

Suppression Is Not Warranted Where An Individual Who Has Not Been Provided With Written Notice Of Wire Interceptions Is Unable To Show Prejudice, Was Unidentified At The Time Notice Was Ordered, Has Had A Reasonable Opportunity To Respond To The Evidence, And Is Unable To Show That The Government Acted Deliberately To Gain An Undue Advantage.

Appellant Kinsler argues that the government's wiretap evidence must be suppressed, as to him, because he was not provided with notice of the interceptions. He makes no attempt to claim or show that he suffered any prejudice as a result of not being provided with a written

inventory. Judge Zampano denied the appellant's pretrial motion to suppress on this issue, and we believe his findings and reasoning deserve quoting at length.

> "No evidence has been presented to indicate that defendants Kinsler, Bell, Amendola, and Adams were known to the government, within the meaning of Title III of the Act, so as to require disclosure of their names at the time the wiretap orders were issued and extended by judges of this District during the first six months of 1973. In fact, as late as February 27, 1974, Agent Connolly informed the grand jury investigating this case that the government was awaiting the results of voice exemplars to establish the identities of certain persons suspected of being overheard, and specifically included these defendants within that category. Subsequently, Agent Connolly reported to the grand jury that the voice tests had been concluded and identifications made. Thereupon an indictment was returned on May 3, 1974. Under these circumstances, since probable cause concerning these defendants may properly be found to be lacking until the spring of 1974, the government was not derelict in failing to reveal their names to the judges who issued and extended the wiretap orders and who established dates for the service of notice inventories. *See United States* v. *Kahn*, 415 U.S. 143, 155 (1974); *United States* v. *Martinez*, 498 F.2d 464, 468 (6 Cir. 1974); *United States* v. *Tortorello*, 480 F.2d 764, 775 (2d Cir), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Frizzell*, 400 F. Supp. 268, 271-272 (E.D.Tenn. 1975); *United States* v. *Chiarizio*, *supra*, 388 F. Supp. at 867-872.
>
> In any event, even assuming these defendants failed to receive timely inventories, suppression of the evidence would be unwarranted. Not every

failure to comply fully with the requirements of Title III renders the interception unlawful. *United States* v. *Chavez, supra.* Unlike the statutory requirement concerning authorization for a wiretap, see *United States* v. *Giordano*, 416 U.S. 505 (1974), it does not appear that a post-interception inventory is a central or functional safeguard under Title III which, if tardily furnished, mandates suppression. One of the main purposes of the inventory procedure is to provide notice to those who have had their communications intercepted and to afford any aggrieved person the opportunity to pursue an appropriate remedy. Therefore, in the absence of a showing of prejudice, a failure to serve a timely notice does not require suppression. *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *United States* v. *Wolk*, 466 F.2d 1143 (8 Cir. 1972); *United States* v. *Forlano*, 358 F. Supp. 56, 59 (S.D.N.Y. 1973). No prejudice has been demonstrated in the instant case. All relevant information, including a complete transcript of the intercepted conversations, has been made available to the defendants for the purposes of pre-trial motions and defenses at trial. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 882-883 (2 Cir.), *cert. denied*, 419 U.S. 1056 (1974). Moreover, there has been no showing that the government deliberately ignored the notice requirements of the statute or that it failed to file inventories in order to gain a tactical advantage. *Compare United States* v. *Eastman*, 465 F.2d 1057 (3 Cir. 1972). To suppress the wiretap evidence under these circumstances 'would be to unnecessarily undermine and subvert the legislation.' *United States* v. *LaGorga, supra*, 336 F. Supp. at 194. See also *United States* v. *Doolittle*, 518 F.2d 500, aff'g 507 F.2d 1368, 1371-1372 (5 Cir. 1975)." (Appendix X, pp. 12-14).

The appellant argues that some Courts have found the inventory provision is a "central safeguard" in the statutory scheme and that a failure to provide written notice must, as a matter of course, result in suppression. *See, e.g., United States* v. *Donovan*, 513 F.2d 337, 342, 344 (6th Cir. 1975), *cert. granted*, — U.S. —, 44 U.S.L.W. 3462 (1976), *but see*, dissent of Judge Engel, at 345-347. This Court, however, has never accepted that viewpoint, and has held that prejudice must be shown in order to cause suppression. *United States* v. *Principie*, 531 F.2d 1132, 1141-1142 (2d Cir. 1976); *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *see also, United States* v. *Smith*, 463 F.2d 710 (10th Cir. 1972); *United States* v. *Cafero*, 473 F.2d 489, 499 (3d Cir. 1973); *United States* v. *Doolittle*, 507 F.2d 1368, 1371-1372, *aff'd en banc*, 518 F.2d 500 (5th Cir. 1975); *United States* v. *Wolk*, 466 F.2d 1143, 1145-1146 (8th Cir. 1972); *but see, United States* v. *Civella*, 533 F.2d 1395 (8th Cir. 1976).

There are sound principles and reasoning behind the decisions which have found that the inventory provision is not a "central safeguard", in the statutory scheme, requiring suppression in the absence of prejudice. In *United States* v. *Chavez*, 416 U.S. 562 (1974), the Supreme Court noted that not "every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful'." *Supra*, at 572-575. In *United States* v. *Giordano*, 416 U.S. 505 (1974), the Court stated:

> ". . . Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that *directly* and *substantially* implement the congressional intention to *limit the use* of intercept procedures to those situations clearly calling for the *employment* of this extraordinary investigative device." *Supra*, at 527 (emphasis added).

The legislative history of Title III also makes it clear that Congress did not intend to "press the scope of the suppression role beyond present search and seizure law". *United States* v. *Giordano*, *supra*, at 528, n.17. The notice requirement obviously must follow the "employment" of electronic surveillance. The proposition was well put by Judge Engel in his dissent to the majority opinion in *Donovan*, when he stated that:

> ". . . since the interception has already occurred, the service of inventory afterward has little, if anything to do with deterring improper initial resort to the procedure. The language '"unlawfully intercepted" must be "stretched"' to include failures of conditions subsequent to a valid authorization and execution . . . It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a 'central role' in 'limiting the use of intercept procedures' where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute . . . I do not agree that the language of the statute compels suppression as the invariable judicial vehicle of enforcement. I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting, in the words of *Chun*, 'a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception'." *United States* v. *Donovan*, *supra*, at 345-346 (citation omitted).'

The Third Circuit, in likewise dealing with this issue, has stated:

> "We find it difficult to accept the proposition that a search may be deemed reasonable, and therefore constitutional during the various stages of application for authorization, execution, supervision of the interception, and termination, only to be invalidated *ab initio* because of the operation of some condition subsequent, to wit, a failure to give notice of the items seized." *United States* v. *Cafero*, 473 F.2d 489, 499 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *see also*, *United States* v. *Averell*, 296 F. Supp. 1004, 1014 (E.D.N.Y. 1969); *United States* v. *Lawson*, 334 F. Supp. 612, 616-617 (E.D. Pa. 1971).

Even the Ninth Circuit in *United States* v. *Chun*, 503 F.2d 533 (9th Cir. 1974), which is cited by the appellant in support of his argument, held that consideration should be given to whether an intercepted party has had a "reasonable opportunity" to adequately respond to the evidence, and whether the government deliberately failed to provide notice in order to gain a tactical advantage. *Supra*, at 538, 542.

Here, of course, Judge Zampano found that the appellant's identity was not known to the government at the time inventory was provided to others, that no prejudice had been shown, that there had been no showing that the government had deliberately ignored the inventory provision,[2] and that the appellant had been supplied with

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[2] The Supreme Court recently considered the exclusionary rule and stated:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or

[Footnote continued on following page]

complete transcripts and all relevant information (Appendix X, pp. 12-14), enabling the appellant to move for pre-trial suppression on a number of grounds. Under these circumstances, and in view of the above cited reasoning we respectfully urge this Court to adhere to its prior decisions and uphold the findings of the District Court.

III.

The Government May Employ A Pen Register Device Where A Court Has Found Probable Cause And Issued An Order Authorizing The Interception Of Wire Communications.

The appellant Valeriano claims that the government's electronic surveillance evidence produced at trial must be suppressed because the Court Order authorizing the wire interceptions did not include authority to employ a "pen register" device (dial number recorder).

At the outset it should be noted that the appellant moved to suppress on this ground for the first time at trial. Regarding the timeliness of the motion, Judge Zampano stated:

> "The motion to suppress is denied for two basic reasons: it's certainly untimely. These materials were available to the defendants certainly for a

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at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused. *Where the official action was pursued in complete good faith, however, the deterrent rationale loses much of its force.*" *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). (Emphasis added.)

> period of months, and maybe even years. Motions to Suppress were presented to this Court and I believe Judge Newman over a period of two years, and they were ruled upon at great length, and certainly this ground should have been presented at that time." Tr., p. 335.

When the appellant's counsel argued that he had not known of the pen register, the Court further stated:

> "This has been practically an open file case and I cannot and will not accept that explanation. The logs, the tapes and various other materials were available to Counsel, and it is up to counsel for the defendant to prepare its case—their case thoroughly and not rely on what might have been assumed." Tr., p. 337.

Judge Zampano also grounded his denial of the motion on the authority of *United States* v. *Falcone*, 505 F.2d 478 (3d Cir.), *cert. denied*, 420 U.S. 955 (1975). In that case, which dealt directly with the issue of whether authorization for a wiretap is sufficient to permit the concomitant implementation of a pen register, the Third Circuit stated:

> "[W]hen used in conjunction with a wiretap, we conclude that an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate order for the latter is necessary. The reasoning for this conclusion is based on an analysis of the operation of a pen register.
>
> A telephone number is only a symbol for a series of electrical impulses. When a telephone number is dialed from a wiretapped phone, the pen

register and the tape recorder are activated simultaneously. Both record the dialing of the phone. And both can be used to determine the telephone number dialed. The pen register records the electrical impulse and automatically translates it back into the number dialed. The tape recorder records the aural manifestation of the electrical impulse which also discloses, if played at a slower speed and examined by an expert, the telephone number dialed. A pen register functions to facilitate the decipherment of the number dialed. It is a mechanical refinement which translates into a different language that which has been monitored already. Simply stated, the pen register avoids a mechanical step; it translates automatically and avoids the interpreter.

We hold for the aforementioned reasons that where a valid wiretap order has issued, use of a pen register is comprehended within the terms of that order." *Supra*, at 482-483; *see also*, *United States* v. *Lanza*, 341 F. Supp. 405. 422 (M.D. Fla. 1972) (Order authorizing the interception of wire communication was sufficient to permit the use of a pen register in conjunction with the wiretap).

The appellant, primarily relies on this Court's decision in *Application of United States In Matter of Order, Etc.*, 538 F.2d 956 (2d Cir. 1976), which held that a pen register Order must be based on probable cause. *Supra*, at 959. The case, however, dealt with an instance in which a pen register *alone* was being sought, and not with the use of a pen register where a Court has authorized a wiretap. Moreover, appellant's argument ignores the fact that Judge Murphy *found* probable cause warranting the

employment of electronic surveillance. *See*, Appendix III.[3]

The United States therefore respectfully urges this Court to uphold the decision of the District Court by adopting the reasoning set forth in *Falcone*, and thereby deny the appellant the unjustified relief he seeks.

IV.

The Government Fully Complied With The Orders Of The District Court Concerning The Providing Of Inventory Notice To The Appellant Valeriano.

The appellant Valeriano alleges that the government failed to provide him with timely service of inventory, as provided by Section 2518(8)(d), Title 18, United States Code. The appellant, in making this argument, recognizes that the statute permits "postponement" of notice on an *ex parte* showing of good cause (18 U.S.C. § 2518(8)(d)). He does not challenge the fact that inventory was originally due by April 30, 1973 that the government received a postponement on April 25, 1973 (30 days), and that a further postponement was granted on May 22, 1973 (Appendices VII, VIII). He does not challenge the fact that inventory was served prior to the expiration of the last

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[3] Even if this Court found that the pen register evidence should have been excluded, the validity of the wiretap itself, and evidence therefrom, which is unchallenged, would not be affected. The suppression of the pen register results, which merely served to assist in the identification of some of the appellants' associates, would, we submit, have no impact on the overwhelming case presented against him, and, therefore, would offer him no relief from his conviction. *See, e.g., United States* v. *Bynum*, 513 F.2d 533 (2d Cir. 1975).

postponement, and he does not challenge whether the required good cause existed. He alleges instead that only *one* postponement is permissible. The statute, however, makes no such numerical distinction but merely states that inventory may be postponed for good cause (18 U.S.C. § 2518(8)(d)). The language is not ambiguous, and the appellant is unable to cite any authority supporting his view that the statute should be given an interpretation at odds with its express language. *See generally, United States* v. *Altese*, Slip Op. No. 902, 2d Cir., July 1, 1976; *see also, United States* v. *LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971) (two postponements of inventory). Moreover, Judge Zampano expressly dealt with this issue and found that:

> "[I]t seems clear that the government complied with the provisions of § 2518(8)(d)." (Appendix X, p. 11).

The government, therefore, submits that the appellants challenge to the timeliness of the service of inventory is totally without merit and should be denied.

V.

The Government Fully Complied With The Sealing Requirement Of 18 U.S.C. § 2518(8)(a).

The appellant Valeriano seeks the suppression of wire interceptions because the recordings were not sealed until six months after the termination of the electronic surveillance. In support of this argument, he cites trial testimony wherein Agent Connolly stated that the tapes had been sealed on July 29, 1973 (Tr., at 218). Unfortunately, appellant's allegation is totally and unquestionably wrong. On January 29, 1973 the tapes in ques-

tion were sealed by the Honorable T. Emmet Clarie in Hartford, Connecticut due to the inavailability of the Honorable Thomas F. Murphy, who had authorized the wiretap. (Appendices IV, V, VI). Moreover, the appellant has previously raised, via Motion to Suppress, the issue of whether a judge who did not authorize the wiretap could seal the tapes *on January 29th*. Judge Zampano held that the tapes had been properly sealed on January 29, 1973. (Appendix X, pp. 9-10). Agent Connolly's misstatement at trial in no way alters the fact that the tapes were presented to the District Court for sealing the day *before* the expiration of the Court Order authorizing the electronic surveillance, and offers no grounds of relief to the appellant. *See, United States* v. *Poeta*, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975).

CONCLUSION

Based on the above-stated reasoning and authorities, the United States suggests that the issues raised by the appellants are without true merit, and we respectfully urge this Court to uphold the findings and verdicts entered by the District Court.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1417, 76-1441

UNITED STATES OF AMERICA

Appellee

v.

DANIEL VALERIANO and FRANK KINSLER

Appellants

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 15th day of December, 1976, deponent

served the within Brief and Appendix

upon Anthony J. LaSala, Esq., Rielly,Peck,Raffile & LaSala, 205 Church Steet, New Haven, Connecticut 06508

Thomas D. Clifford,Esq., Shipman & Goodwin, 799 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Lunsky

Sworn to before me,

This 15th day of December 1976

Notary Public, State of New York
No. 24-4502706
Qualified in Kings County
Commission Expires March 30, 1977